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IN THE

Supreme Court of the United States

October Term, 1943

No. 268

GEORGE C. BENNETT,
Petitioner,

v.

JULIUS De GEETER,
Respondent.

PETITION FOR A REHEARING UPON PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY COURT OF ERRORS AND APPEALS

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EDOUARD L. DUNNE,
Solicitor for Petitioner.

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To the Honorable The Chief Justice and the Associate Justices of the United States Supreme Court:

Petitioner, George C. Bennett, respectfully petitions that a rehearing be granted upon his petition for a writ of certiorari upon the following grounds:

The State of New Jersey, in the instant case, has swept away petitioner's fundamental rights as a citizen of the United States and as a creature of God.

Unless this Court will enforce petitioner's rights as a citizen of the United States as guaranteed him by the Federal Constitution, he must stand as a laborer who was *not* worthy of his hire, he will have given of the sweat of his brow and yet is to be denied the bread for him to eat. Moreover, petitioner will have been deprived of his

property without due process of law and denied the equal protection of the laws.* His right to have disputed issues of fact in his action at law decided by a jury will have been denied him.

The treasure and blood of this Nation are being poured out to defend our constitutional system of government. That system includes the guaranty of the rights of the humblest of its citizens. The right to due process and to the equal protection of the laws are as fundamental as the right to freedom of speech and religion and would be among the first privileges this Nation's enemies would destroy. Encroachments upon any of these rights are injurious to the public interest and should not be tolerated.

It is axiomatic that no man can accept the benefits of the labors of another without compensating him. Our American way of life does not countenance a system whereby one man is to be enriched at the expense of another. American justice is equal to all alike. Just as the executive and legislative branches of our government consider the welfare of the individual to be a matter of national interest so also does the judicial branch consider the denial of equal justice to an individual to be a matter of national interest.

In the instant case, Bennett is seeking to recover compensation for services rendered by him for a period approximating 12 months and for which De Geeter admits he did not pay him. The explanation being "I didn't have a chance to pay him" (R. p. 167; also p. 431). The services were substantial and valuable. De Geeter received the benefit of Bennett's work. Bennett's right to recover the reasonable value of his services is a fundamental inalienable right. One of the purposes of the 14th Amend-

* The point upon which this Federal Question turns is that petitioner's right to recover the reasonable value of services is not within any issue which the parties set out to try in Chancery or that in point of fact they did try.

ment of the Federal Constitution was to guarantee against an abridgement of such a right by any of the States. However, the State of New Jersey has destroyed such right on Bennett's part. The State of New Jersey, acting through its judiciary, has permanently enjoined Bennett from prosecuting his action to enforce his right to compensation.

The petition for the writ of certiorari and the briefs in support and in opposition to that application all dealt at length with the mooted question of equity jurisdiction. This was done because the error of the Courts of New Jersey on this point was so manifest that petitioner considered it advisable to lay it before this court. However, as correct as petitioner was in his contention and as flagrantly wrong as the New Jersey Court of Errors was on this point, this Honorable Court may have concluded that no matter of Federal jurisdiction was therein involved.

This petition for rehearing is filed for the definite purpose of focusing the court's attention upon the injunction which prevents Bennett from enforcing his common law right to recover the reasonable value of his services. The dispute in the courts below involved an alleged express agreement and the relationship of the parties that grew out of it. It may be that the question as to whether or not Bennett has had his day in court under this alleged express agreement presents no federal question and notwithstanding the votes of the Chief Justice and 4 of the Justices of the New Jersey Court of Errors and Appeals to reverse the Chancellor's decree, Bennett may be barred and precluded from a second trial in another forum *on that issue.* But, assuming this to be so and that no Federal Question is thereby involved, the denial of Bennett's right to a trial before a jury of his fundamental right to recover the reasonable value of services rendered by him and the benefit of which was accepted by De Geeter, raises a Federal Question which is of towering im-

portance. It cannot be contended that Bennett has had his day in Court in any sense upon his claim for *quantum meruit* compensation nor that such claim has been adjudicated. It was not in the pleadings before the Court of Chancery nor was any evidence adduced upon that issue. The adjudication of the Chancellor that "no monies were due and owing" Bennett, must be read in the light of the pleadings in the equity suit and the only construction and interpretation to be given such adjudication is that there are no monies "due and owing" under the express agreement alleged by Bennett in his counterclaim in that suit (R. p. 9).

From October, 1936 to September, 1937 which was the period of the construction of the rink and prior to the time referred to in the Chancery complaint, Bennett, who was an experienced building and construction man (R. pp. 300, 301) gave of his time, skill and experience for about a year in the planning and construction of the rink. It was Bennett who approved the site (R. p. 306), graded it (R. p. 240), arranged for the surveying (R. p. 244), prepared the plans (R., Exhibit D-5, p. 442, also p. 308), prepared the material lists (R. pp. 286, 316), placed the orders for materials and pledged his own credit therefor (R., Exhibit D-7, p. 447), supervised the laying of the foundation (R. p. 246), arranged for the hauling, erected the steel trusses (R. pp. 253, 289), arranged the roofing contract (R. p. 292), superintended the entire construction (R. pp. 240, 246, 250, 253, 289, 292). He thereby established De Geeter in a highly profitable business. Bennett was not paid for this work. He claimed his compensation was to be measured by a percentage of the profits from the enterprise. He commenced an action at law alleging two counts—under the first count the terms of the express agreement and

sought money damages for its breach—under the second count Bennett asked the reasonable value of his services.*

De Geeter joined issue and two years later, fearing a trial by jury and while the law court was in summer recess, De Geeter filed a bill in chancery praying for an injunction restraining Bennett from proceeding with his law action. In his bill (R. p. 30) De Geeter alleges as the period of employment only the time subsequent to the opening of the rink, and subsequent to the rendition of the services for which Bennett on any theory has not been paid and for which he seeks a recovery. De Geeter alleged that during this subsequent period Bennett was an employee in the rink but that Bennett was seeking an interest in a partnership. Bennett put in a counterclaim in that court. He asked the Chancellor to determine if he was a partner and, if so, to give him an

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* The law in New Jersey is clear and definite that if Bennett failed in proving the express agreement he could nevertheless recover the reasonable value of his services under his second count.

Harris, Pleading and Practice in New Jersey (Revised Ed.), sec. 315, page 318: "* * * in case one may fail to set forth or prove an express contract, he may yet be able to recover on an implied contract for the reasonable value of services performed or material furnished."

Kirkpatrick v. *McElroy,* 41 N. J. Eq. 539 (earlier case, 37 N. J. Eq. 137, at p. 140), wherein the failure to establish an express agreement for a percentage of profits was held to be no bar to a recovery upon *quantum meruit. Heywood* v. *City of Buffalo,* 14 N. Y. 534; *Water C. & G. Co.* v. *Hutchinson,* 160 Fed. 41; 19 L. R. A. (N. S.) 219; *Freeman on Judgments,* 5th Ed., sec. 736; *McKeon* v. *Van Slyck,* 223 N. Y. 392.

"Where the complaint counts upon a special contract and the plaintiff fails in establishing the same, but does show that in fact services were rendered, he may recover upon *quantum meruit.* Such rule has long been the settled law (*Sussdorff* v. *Schmidt,* 55 N. Y. 319); *Rubin* v. *Cohen,* 129 App. Div. 395.

"Although the party seeking to recover on the special count fails altogether, he may recover on the common counts, provided the case is such that, supposing there had been no special contract, he might still have recovered." *7 Corpus Juris Secundum* 126.

accounting. Otherwise Bennett insisted he be allowed to proceed with his law action. The Chancellor determined that Bennett was not a partner but was an employee "who received a fixed compensation during the period of his employment". Such period of employment, however, could only be the period defined by the bill itself (R. p. 30) which does not include the period in which Bennett rendered the services for which he seeks to recover compensation.

Our quarrel here is not with the determination of the Chancellor that a partnership did not exist or that Bennett received compensation for the period subsequent to September, 1937. Our quarrel is with the refusal of the Court to permit a trial of Bennett's claim for the reasonable value of the services which were concededly rendered by him prior to September, 1937. There has been no trial of those issues anywhere and the injunction bars petitioner from having them tried, and it is the injunction which constitutes the denial of due process and of equal protection and which raises the Federal Question.

Petitioner's right to recover upon *quantum meruit* is not at all affected by the dismissal of his counterclaim in chancery for an account of profits. As was said in *Buckingham* v. *Ludlum,* 37 N. J. Eq. 137 at page 141:

> "In the first he was seeking to enforce an express contract, which entitled him to a specific share of the profits, regardless of the value of the services he had contributed in earning them; while that which he is now prosecuting, is based exclusively on the fact that he had rendered valuable services to this firm, at their request, without stipulation as to price, but under a promise implied by law, that he should be paid what his services were reasonably worth. A judgment in the first case, adjudging either that the contract on which that suit was founded, was not proved, or that the contract was invalid, it is obvious, could not touch, even collaterally, the question whether

the petitioner had rendered services for which, in justice, he ought to be paid. The petitioner's present claim is unaffected in any way, in my judgment, by the judgment pronounced against him in the previous suit''.

De Geeter's brief in opposition to the application to this court, contained erroneous statements of fact and an array of New Jersey authorities which not alone failed completely to support De Geeter's contention but rather showed clearly the law as urged by Bennett. Furthermore, the New Jersey authorities cited by De Geeter established the instant matter as a case standing alone and in direct conflict with the judicial precedents of that State.*

Petitioner prepared and filed with this Court a reply brief which completely dispelled the contentions raised in respondent's brief; but, unfortunately, the reply brief was filed with this Court virtually *on the eve of the decision* denying the petition was announced. The petitioner is constrained to believe that this Court may not have had an opportunity to consider the reply brief to which petitioner now respectfully refers it.

In his reply brief, petitioner clearly showed that:

The Federal question was not only raised in the State court but actually urged in his brief before that court.

Respondent utterly failed to meet petitioner's contention that the restraint of the law action is a deprivation of due process.

The New Jersey cases cited by respondent did not support his contention but rather sustained petitioner's position throughout the litigation in the State courts.

The decision of the Court of Errors and Appeals in the case at bar is clearly in conflict with applicable

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* See pages 3, 4, 7, Petitioner's Reply Brief.

decisions of this Court. *Scott* v. *McNeal*, 154 U. S. 34; *Old Wayne Life Association* v. *McDonough*, 204 U. S. 8; *Twining* v. *New Jersey*, 211 U. S. 110; *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill*, 281 U. S. 673.

Briefly stated, petitioner claims the protection of the Fourteenth Amendment of the Federal constitution. The State of New Jersey, acting through its judiciary, has deprived the petitioner of due process of law and of the equal protection of the law. The State of New Jersey has destroyed petitioner's fundamental right to enforce his legal demand for damages and for the reasonable value of his services *by denying to petitioner his remedy, e. g.*, the right to proceed in the law courts with the trial of his legal issues.

The Federal Question is presented by the record for this reason: the Chancellor's decree, as affirmed, contains an injunction which perpetually enjoins Bennett from proceeding with his action at law. It is the injunction that prevents Bennett from enforcing his right to recover upon *quantum meruit* the services rendered prior to September, 1937, which is the claim set forth in his second count of his complaint at law (R. pp. 46, 47). The Chancery decree (except for the injunction) is not a bar to a recovery upon such claim under *quantum meruit* nor is it *res adjudicata* as to such claim. It would almost appear that in giving consideration to the involved and unusual question of the Chancellor having exceeded his jurisdiction that the courts dealing with this matter have heretofore overlooked the restraint contained in the Chancellor's decree and the effect of that restraint as being a denial of due process of law and of the equal protection of the law.

So long as this injunction stands, Bennett cannot proceed to enforce his right to recover the reasonable value of his services rendered prior to September, 1937; and this, notwithstanding De Geeter's own counsel on the oral argument before the New Jersey Court of Errors and Appeals

opening stated that it was never intended that the injunction should operate against the second count in the law action.

In granting a rehearing and issuing its writ of certiorari in the *Brinkerhoff-Faris case* (*supra*) this Court had before it a case wherein all remedy for the enforcement of a right had been denied by the State Court. For precisely the same reason certiorari ought to be granted in the instant case.

Conclusion

This Court is asked to grant a rehearing and issue its writ of certiorari to the New Jersey Court of Errors and Appeals, to the end, at least, that *the injunction* of the Court of Chancery which enjoins petitioner from prosecuting his prior pending action at law may *be dissolved insofar as it relates to* and presents a trial of the issues raised in the *second count* of petitioner's complaint at law for the reasonable value of his services.

Respectfully submitted,

ELLWOOD THOMAS,
Counsel for Petitioner,

EDOUARD L. DUNNE,
Solicitor for Petitioner.

CERTIFICATE OF COUNSEL

I, ELLWOOD THOMAS, of Counsel for the above named petitioner, hereby certify that the foregoing petition for Rehearing is presented in good faith and not for delay.

ELLWOOD THOMAS.